83-536

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BARCLAY RIDING ACADEMY, INC., now known as Barclay Equestrian Center, Inc., a New Jersey corporation,

Petitioner,

—against—

CONTINENTAL BANK OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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Questions Presented

1. Whether The Bank Holding Company Act, 12 U.S.C. §1971 *et seq.* was violated when a bank entered into an unusual and uncommon transaction with a customer which involved a tie-in but there was no proof that the transaction had an anti-competitive effect and was not primarily designed to enhance the market power of the bank?

2. Whether The Bank Holding Company Act was violated where a bank, as a condition for extending credit to a customer, required a third party, who had no equity interest in the customer, to grant a security interest in the latter's real property and had therefore demanded additional credit and property not related to the extension of credit to the first customer?

3. Whether The Bank Holding Company Act was violated when a bank, as a condition for extending credit to a corporation which was a customer of the bank, required an individual customer who was an officer, director and shareholder of the corporation to provide additional property in the form of a mortgage on real property owned by an unrelated corporation of which the individual customer is the sole shareholder?

4. Whether a tie-in constitutes a *per se* violation of The Bank Holding Company Act even if there is no apparent anti-competitive effect and no proof that the tie-in enhanced the market power of a bank?

Parties

All parties to the Petition and in the Court whose judgment is sought to be reviewed are set forth in the caption.

Petitioner, Barclay Riding Academy, Inc., is not owned by any parent corporation and has no ownership interest in any subsidiaries and has no affiliates.

Dated: September 26, 1983

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Petitioner petitions for a writ of certiorari to review a final judgment of the Supreme Court of the State of New Jersey in this case.

Opinions Below

The oral opinion of Judge Alexander C. Wood, III, of the Superior Court of New Jersey Chancery Division—Burlington County, New Jersey on April 6, 1981, which

invalidated a mortgage given by petitioner to respondent, is unreported and appears in Appendix C (*infra,* 32a). The Appellate Division of the Supreme Court of the State of New Jersey affirmed the trial court in an unreported *per curiam* opinion which appears in Appendix B (*infra,* 30a). The opinion of the Supreme Court of the State of New Jersey, which reversed the judgment of the Appellate Division of the Superior Court of New Jersey is unreported and appears in Appendix A (*infra,* 1a-29a).

Jurisdiction

The final judgment of the Supreme Court of the State of New Jersey was filed on May 9, 1983 (Appendix A, *infra,* 29a). The order of this Honorable Court extending the time until September 27, 1983 within which to petition for certiorari is annexed hereto as Appendix E (*infra,* 47a). The jurisdiction of this Court is invoked under 28 U. S. C. §1257.

Statute Involved

The federal statute involved is The Bank Holding Company Act, 12 U. S. C. §1971, *et seq.* and particularly 12 U. S. C. §1972(1)(C).

The statute is set forth in Appendix F (*infra,* 48a).

Statement of the Case

This suit originated in an action instituted by respondent Continental Bank of Pennsylvania ("Continental") to foreclose a mortgage given to Continental by Barclay Riding Academy, Inc. ("Barclay") in connection with a

loan transaction between Continental and Shulman Transport Enterprises, Inc. ("STE") a corporation wholly unrelated to Barclay. The trial court (Wood, J.) invalidated the mortgage on the grounds, *inter alia,* that the requirement that a mortgage be given to Continental by Barclay, as a condition for extending credit to STE, and that Martin Shulman ("Martin"), a minority shareholder of STE, convert his personal unsecured debt into a secured debt in the form of a mortgage on property owned by Barclay whose sole shareholder was Martin, violated The Bank Holding Company Act ("Act") and, more particularly 12 U. S. C. §1972(1)(C).

The Superior Court of New Jersey, Appellate Division ("Appellate Division") affirmed the trial court in an unreported *per curiam* opinion. Respondent's petition for certification to the Supreme Court of the State of New Jersey ("Supreme Court") was granted. 91 N.J. 254 (1982). Thereafter, the Supreme Court reversed the judgment of the Appellate Division. In its opinion (Garibaldi, J.), the Supreme Court rejected the claim that the mortgage transaction violated the Act on the grounds, *inter alia,* that: (a) there was no proof of an illegal tie-in Appendix A (*infra,* 13a); (b) Continental did not receive a benefit entirely unrelated to Continental's security as a lender Appendix A (*infra,* 14a); and (c) there was no proof of any anti-competitive impact Appendix A (*infra,* 14a-15a).[1]

The challenged mortgage transaction arose out of the following circumstances: for many years prior to 1978 STE was a substantial customer of Continental. STE was a public company and the number of its shareholders exceeded 1,250. Martin and Harry Shulman ("Harry") had

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[1] The Supreme Court overlooked the fact that as an incident to the loan transaction Continental secured from STE mortgages on two valuable parcels of property which were never included as security granted to Continental in connection with all prior loans.

been customers of Continental for many years prior to 1978. On March 20, 1978, Martin was Chairman of the Board of Directors of STE and its Chief Operating Officer and owned a minority stock interest in STE. Harry was a Director but not an officer of STE and also held a minority interest in STE.

Martin was the sole shareholder of Barclay, a New Jersey corporation, which owned property in New Jersey. Barclay was neither a parent, subsidiary or affiliate of STE.

On March 30, 1978, Continental agreed to extend to STE an additional $1,000,000 line of credit provided that Martin and Harry invested $1,300,000 of their funds Appendix A (*infra* 4a). Martin and Harry invested the $1,300,000 (in the form of a loan to STE) but Continental did not extend the promised line of credit. Now, as part of the above-described transaction, Martin and Harry were given a junior participation in certain loans previously made to STE by Continental but the $1,300,000 advance made by Martin and Harry was subordinated to all outstanding debts due to Continental then and thereafter in effect Appendix A (*infra* 5a-6a). Additionally, critical to this case, is the acknowledged fact that Continental imposed a further requirement, namely that a mortgage be given on property owned by Barclay Appendix A (*infra* 6a-7a).

Petitioner does not seek this writ of certiorari to challenge Continental's requirement for an additional investment or loan of $1,300,000 by Martin and Harry or the agreement to provide them with a junior participation. The subject of this petition is the requirement that Martin provide, through Barclay, a mortgage on Barclay's property as a condition for the agreement by Continental to extend the line of credit to STE by lending to STE the

sum of $1,000,000 and the requirement that Martin convert an unsecured loan into a secured loan.

As stated, the Supreme Court held that the exaction of a mortgage on Barclay's property was not an unusual transaction but if it were unusual, there was no tie-in or anti-competitive effect proscribed by the Act; hence, the Barclay mortgage was valid and Continental could foreclose it.

The issue of the illegality of the Barclay mortgage under the Act was raised in Barclay's answer to the complaint of Continental seeking to foreclose the mortgage Appendix D (*infra,* 48a); the federal issue was raised again in the Appellate Division in briefs filed by Continental and Barclay, in the petition for certification to the Supreme Court; in briefs filed by Barclay and Continental in the Supreme Court, all as shown in the opinion of the trial court Appendix C (*infra,* 32a) and the opinion of the Supreme Court Appendix A (*infra,* 16a). The federal issue was passed upon by the trial court at the conclusion of trial Appendix C (*infra* 32a) and by the Appellate Division in its affirmance of the decision of the trial court Appendix B (*infra,* 30a-31a).

Simply stated, in the answer and in the appeals to the Appellate Division and the Supreme Court, Barclay asserted, and the expert testimony adduced at trial (Appendix C, *infra* 39a)[2] proved that the mortgage violated the Act by exacting, in an unusual transaction, additional credit and property in the form of a mortgage, not related to, or usually provided in connection with, a loan transaction between a bank and its customers and, as a matter of law, this constituted a prohibited tying arrangement.

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[2] The Supreme Court incorrectly disregarded the facts adduced from experts.

Reasons for Granting the Writ

1. If the petition is granted, the appeal will provide an appropriate occasion for this Honorable Court to construe, for the first time, the 1970 amendments to the Act and to correct misimpressions evidenced by certain decisions of some federal district courts and four Courts of Appeals that these amendments were designed solely and exclusively to prevent a bank from using its economic power to restrain competition.

The legislative history of the amendments to the Act, concededly exiguous, shows that Congress intended to expand the reach of the Act to tie-ins and to reciprocal dealings other than those patently designed to enhance a bank's market power. Thus, when a bank agrees to grant a loan on the condition that the borrower purchase insurance from a bank's subsidiary corporation, that tie-in was prohibited by the Act both prior and subsequent to the 1970 amendments. Reciprocal dealing agreements which, for example, involve a requirement by a bank, in awarding a construction contract for a branch office, that the builder maintain the deposit balance with the bank is proscribed. Thus, the Act forbids various tie-in and reciprocal dealing arrangements other than the kinds illustrated above.[3]

The requirement that a mortgage be given by an unrelated party (Barclay) is not sanitized merely because Martin was the sole shareholder of Barclay and a minority, though substantial, shareholder of STE. There is no dis-

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[3] The condition for the extension of additional credit to STE, that Harry and Martin purchase a junior participation is reciprocal in the sense that Continental would not purchase the note from STE reflecting the extension of credit unless Martin and Harry purchased a "product", i.e., a junior participation, from Continental.

pute that Continental extended or promised to extend credit to STE on the condition that Martin, a customer, obtain some additional credit or additional property from Barclay, a company wholly unrelated to STE. The uncontroverted fact is that Continental would not provide any funds to STE until the loans or investments by Martin and Harry were completed, the Barclay mortgage was delivered and Martin converted a long-standing unsecured loan into a collateral note.[4] These are *per se* violations of the Act, just as price-fixing is a *per se* violation of the Sherman Act.

2. The decision by the Supreme Court is plainly in conflict with decisions by the Court of Appeals for the Fifth, Sixth and Seventh Circuits. There is also an apparent conflict of opinions between the Fifth, Sixth and Seventh Circuit Court of Appeals, on the one hand, and the First, Third, Tenth and Eleventh Circuit Court of Appeals, on the other. The decision in *Swerdloff* v. *Miami National Bank,* 584 F. 2d 54 (5th Cir. 1978) and *Costner* v. *Blount National Bank of Maryville, Tenn.,* 578 F.2d 1192 (6th Cir. 1978) did not, as the Supreme Court erroneously held, involve transactions which were "principally designed to enhance the bank's own market power" Appendix A (*infra* 13a).

The Supreme Court misread the decision of the Court of Appeals for the First Circuit in *B. C. Recreational Industries* v. *First National Bank of Boston,* 639 F. 2d 828 (1981). That case involved a requirement by a bank that the direct borrower engage a business advisor desig-

[4] This is either or both a tie-in or reciprocal arrangement which the Act condemns because it is a condition and requirement for additional property not related to the loan arrangement with STE and not usually provided and not because it constitutes classic tie-in or reciprocal arrangements.

nated by the bank. Plainly, this was not an unusual transaction. So, too, in *McCoy* v. *The Franklin Savings Association and Mortgage Management Company,* 636 F. 2d 172 (7th Cir. 1980) relied upon by the Supreme Court the arrangement was a conventional and traditional one. There, the bank required certain improvements to be made to the subject property before additional funds were advanced by way of a loan to the borrower who owned the property to be liened. Finally, the decision by the Court of Appeals for the Third Circuit in *Tose National Bank, N. A.,* 648 F. 2d 870 (3d Cir. 1981) *cert. denied* 454 U. S. 893 (1981) also cited by the Supreme Court, dealt only with a condition to be imposed on the borrower, namely that financial control of the borrower's football team must be vested in an official designated by the bank, was a usual one. This is not an uncommon or unusual arrangement. And the decision by the Tenth Circuit in *Clark* v. *United Bank of Denver National Association,* 480 F. 2d 235 (10th Cir. 1973) *cert. denied* 414 U. S. 1004 (1973) dealt with a compensating balance—a requirement usually and conventionally imposed upon a direct borrower. The decision by the Eleventh Circuit in *Parsons Steel, Inc.* v. *First Alabama Bank of Montgomery, N.A.,* 679 F. 2d 242 (11th Cir. 1982) involved a parent-subsidiary relationship and an accepted and traditional arrangement that there be a change in corporate management; but the requirement for restructuring the capital stock approved by the Court was in conflict with the decision in *Swerdloff* v. *Miami National Bank, supra.* The additional requirement of a guarantee by shareholders of a borrowing corporation is a usual one because it related only to the direct borrower corporation.

In all other decisions by federal districts courts, relied upon by the Supreme Court, the challenged conditions were imposed solely on the borrower and not on an unrelated corporation.

3. The thesis underlying the decision by the Supreme Court was that unusual transactions do not violate the Act if there is no proof of anti-competitive effect. Neither the legislative history of the 1970 amendments to the Act nor the decisional precedents suggest, as did the Supreme Court, that there must be proof of anti-competitive effect Appendix A (*infra,* 14a). Indeed, even if proof of anti-competitive impact is required, the evidence showed that there was, inevitably, an anti-competitive effect. Considering that all of the assets of STE, Barclay and Martin were liened by Continental, there was simply no way, in the real world, for STE, Barclay or Martin to secure financing from any other bank or lending institution.

4. An appeal will demonstrate that the requirement that credit will be extended only if the customer provides additional credit or property or services through an unrelated third party constitutes a *per se* violation of the Act. The very terms of the amendments show that there need be no proof that in making an arrangement which is unusual or uncommon, the lending institution attempts to "corner the lending market" Appendix A (*infra,* 15a).

CONCLUSION

This Court should grant the petition for certiorari and hear the issues raised in this important area of banking and antitrust laws and to resolve a conflict between the decision of the Supreme Court of the State of New Jersey and the Courts of Appeals for the Fifth, Sixth and Seventh Circuits and the conflict between these Courts and other Courts of Appeals.

Respectfully submitted,

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Dated: September 26, 1983

APPENDIX A

Opinion and Judgment of the Supreme Court of New Jersey

(Filed—May 9, 1983)

SUPREME COURT OF NEW JERSEY

A-67 September Term 1982

CONTINENTAL BANK OF PENNSYLVANIA,

Plaintiff-Appellant,

v.

BARCLAY RIDING ACADEMY, INC., now known as Barclay Equestrian Center, Inc., a New Jersey corporation,

Defendant-Respondent.

Argued January 24, 1983—Decided May 9, 1983.

On certification to the Superior Court, Appellate Division.

George F. Kugler, Jr., argued the cause for appellant (*Archer & Greiner,* attorneys; *Morton Newman* and *William E. Taylor, III,* members of the Pennsylvania bar, and *Stephen M. Orlofsky,* of counsel).

W. Barry Rank argued the cause for respondent (*Weston, Kravitz & Rank,* attorneys).

The opinion of the Court was delivered by Garibaldi, J.

This is an action to foreclose a mortgage given by Barclay Riding Academy, Inc. ("Barclay")[1] to Continental Bank of Pennsylvania ("Continental"). At issue is whether the mortgage is void because (1) it violates the anti-tying provisions of Section 1972(1)(C) of the Bank Holding Company Act, 12 U.S.C. §§ 1971-1978, as amended (the "Act"); (2) it was given without consideration; or (3) it was executed under duress.

The trial court invalidated the mortgage for all three reasons, any one of which alone is sufficient to void the mortgage. The Appellate Division affirmed the trial court in an unreported *per curiam* opinion, and we granted Continental's petition for certification. 91 N.J. 254 (1982).

We conclude that the mortgage is valid, and reverse the judgment of the Appellate Division.

I.

The initial question before us is whether Continental, by requiring the Barclay mortgage, engaged in appropriate banking practices in seeking additional protection for its substantial loans to Shulman Transport Enter-

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[1] Defendant is now known as Barclay Equestrian Center, Inc.

prises, Inc. ("STE") and Martin Shulman ("Martin"). The answer to this question requires an examination of the financial transactions and interrelationships over the years among Continental, STE, Martin, and Martin's brother Harry Shulman ("Harry").

For many years prior to 1978, Continental served as the main bank for STE, a publicly held company engaged in the transportation business. During that time, Continental also performed banking services for Martin and Harry Shulman, who were the founders, controlling shareholders, officers, and directors of STE. Martin was the Chairman of the Board of Directors of STE and its Chief Executive Officer. Martin also was the sole stockholder of Barclay, the named defendant in this action.

Until 1976, STE had been a very profitable corporation and had maintained a regular line of credit with Continental on an unsecured basis. In 1976, STE began to suffer serious financial reverses. These reverses created the need for significantly greater corporate borrowing. In March 1977, STE and Continental entered into a secured loan agreement by which Continental extended to STE a 2-year $6,500,000 line of credit, secured by all the accounts receivable and certain other assets belonging to STE. Within three months STE required additional financing. Accordingly, Continental increased the line of credit and received additional security.

The financial fortunes of STE continued to deteriorate during 1977. By January 1978, STE's independent auditors had concluded that they would be unable to report STE as a going concern unless the corporation received a major infusion of working capital. The Shulmans

approached Continental in February 1978 and requested an additional loan. Continental refused to advance more funds unless STE obtained substantial capital from another source. STE then requested a $1.5 million loan from its largest creditor, American Airlines ("American"). Continental agreed that if STE obtained a loan from American, it would permit STE to release certain assets to American as security.[2] However, for reasons not relevant here, American was unable to make the loan.

Determined to save STE, the Shulmans arranged a meeting for March 30, 1978 between themselves, their counsel, and representatives of Continental. At this meeting, the Shulmans asked Continental if it would be willing to extend to STE an additional $1,000,000 line of credit if the Shulmans would invest $1,300,000 of their own funds in STE. The Shulmans had initially proposed that they would loan their money directly to STE and receive the same security that American would have received under the initial plan. Continental did not consent to a release of any security to the Shulmans. Instead, Continental suggested that the Shulmans advance their funds to Continental and accept a junior participation in Continental's existing and additional loans to STE. Continental alleges that it urged this arrangement in order to give the Shulmans more protection than they would have received as general unsecured creditors of STE. The Shulmans accepted this arrangement, and a second Amended Loan Agreement and a Junior Participation Agreement ("JPA") were executed.

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[2] The original loan agreement required STE to obtain Continental's consent to any encumbrance upon its assets.

Under the JPA, the Shulmans' loans were subordinated to all of STE's then-outstanding loans due to Continental as well as all future advances Continental would make to STE.[3]

Since 1972, Martin had outstanding a $185,000 personal loan from Continental, which the bank maintained in exchange of Martin's personal note executed every six months.[4] This note, which Continental concedes was originally unsecured, had been routinely renewed every six months. The record establishes that the renewal note in existence at the time of the March 1978 meeting was not due until June 6, 1978. Further, it is

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[3] Barclay originally counterclaimed in this action for treble damages and attorneys' fees based on alleged violations of the Bank Holding Company Act and for additional damages due to fraud and misrepresentation. After Barclay withdrew these counterclaims, STE and the Shulmans raised those issues against Continental in a suit instituted in the United States District Court for the Eastern District of Pennsylvania. In that action, Continental obtained a partial summary judgment that the junior participation agreement did not violate the Act. *Shulman* v. *Continental Bank,* 513 F. Supp. 979(E.D. Pa. 1981).

[4] Unfortunately, the note in existence in March 1978 was not admitted into evidence below. It is therefore uncertain whether that note could be called upon demand by Continental. Significantly, the renewal note executed on June 6, 1978, which does appear in the record, was clearly a demand note secured by collateral including all "tangible and intangible property of the borrower [Martin Shulman] which the Bank [Continental] may now or hereafter have in its possession or control." We find that the terms of the June 1978 note and other record evidence support the inference that the note outstanding as of March 1978 was a demand note. However, for reasons stated *infra* at —— (slip op. at 21-23), this inference is not essential to our finding of consideration here.

uncontroverted that this note was not in default at the time of said meeting.

Since 1974, Martin also had maintained a $350,000 Certificate of Deposit ("C.D.") with Continental. This C.D. was never formally pledged as security for Martin's original $185,000 note. However, we find it reasonable to infer that Continental considered the C.D.'s existence in its periodic decisions to renew Martin's note. The C.D. represented Martin's major liquid asset. During the course of the March 30, 1978 meeting, it became evident to all parties that Martin would need to redeem the C.D. in order to advance funds to Continental for STE under the JPA.

At some point during the March 30th meeting, the Chairman of Continental, Roy Peraino, requested a private conference with Martin. In that conference, Peraino advised Martin that in view of Martin's proposed redemption of his C.D., Continental would require additional security for its own investment in the Shulmans' financial undertakings. Specifically, Continental wanted Martin to arrange a mortgage on farm property owned by Barclay, a corporation of which Martin was sole shareholder. This mortgage would secure, in particular, Martin's theretofore unsecured $185,000 note, which was scheduled for renewal in June 1978. The mortgage would also serve as further protection for Continental's $1 million extension of credit to STE then under discussion. In order to prevent Martin from incurring any penalty for the premature redemption of the C.D., Continental also arranged to give him a two-week "bridge loan" of $350,000.

Martin agreed to Continental's request for the mortgage on the Barclay property. Within days, the requi-

site agreements were drafted and executed. Acting as its sole stockholder, Martin caused Barclay to execute and deliver to Continental a bond and warrant, a mortgage, and a power to pledge. Barclay also adopted a corporate resolution, acknowledging the transaction as being in its corporate interest and authorizing Martin to take the necessary steps to consummate the transaction. The mortgage was properly recorded. Continental, meanwhile, renewed Martin's personal note on June 6. 1978. The bridge loan was also executed as promised.

Despite all these efforts, STE failed. On August 2, 1978, it filed for bankruptcy under Chapter XI of the Bankruptcy Code of 1978, 11 U.S.C. §§ 1101-1174. When Martin's personal loan came due, he defaulted, and Continental initiated this foreclosure action.

II.

The court below agreed with Barclay's allegation that Continental violated the anti-tying provisions of the Act when, as a condition to its agreement to provide more funds to STE, it required the Barclay mortgage as security for Martin's previously unsecured loan.[5] We disagree. The legislative history of the Act and the cases decided thereunder establish that this transaction is not

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[5] Although the federal district courts are vested with jurisdiction to entertain § 1972 suits under 12 U.S.C. § 1973, a mortgagor injured by a prohibited practice under § 1972 can assert a violation of the provision as a valid defense in a state mortgage foreclosure action. *See Kaiser Steel Corporation* v. *Mullins,* 455 U.S. 72, 81 n.7, 70 L.Ed. 2d 833, 842 n.7, 102 S.Ct. 851, n.7 (1982); *Associated East Mortgage Co.* v. *Young,* 163 N.J. Super. 315 (Ch. Div. 1978).

prohibited by the Act. The relevant amendment provides in part:

> (1) A bank[6] shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—
>
> (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service; [12 U.S.C. § 1972(1)(C)]

The legislative history of the 1970 Amendments to the Act ("the Amendments") reveals that they were enacted to provide specific legislative assurance that a bank would not use its economic power to reduce competition. The Amendments were not intended to interfere with appropriate and traditional practices used by a bank to protect its investment. This is reflected in the 1970 Senate Commitee Report relating to the Amendments:

> The purpose of this provision is to prohibit anticompetitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire.
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> * * *

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[6] A "bank" for purposes of § 1972 includes both state and federally chartered banks. 12 U.S.C. § 1841(c).

> The committee does not intend, however, that the provision interfere with the conduct of appropriate traditional banking practices. [S.Rep. No. 1084, 91st Cong., 2d Sess. (1970) reprinted in [1970] U.S. Code Cong. & Ad. News 5519, 5535-36]

Although there is no comprehensive list of services that Congress intended to exempt from § 1972, several types of transactions specifically were cited in the Congressional debates as illustrative of appropriate and traditional banking services. We find the following excerpt of the Senate Floor debates particularly significant:

> Bank loans are usually made on the basis of a careful analysis of the would-be borrower's financial position, including his assets, liabilities, income, expenses, cash flow, et cetera. It is customary, especially where a borrower is borrowing up to the limit of his ability to pay, to require that during the term of the loan he should not borrow or pledge his assets elsewhere. Such an arrangement is clearly required as a matter of sound banking. [116 Cong. Rec. 32125 (1970) (Statement of Sen. Bennett)]

We conclude from the legislative history that appropriate and traditional transactions engaged in by a bank to protect its investments' do not violate the Act. This conclusion has been confirmed by recent decisions of the federal courts.

The Court of Appeals for the First Circuit in *B.C. Recreational Indus.* v. *First Nat'l Bank of Boston,* 639 F.2d 828 (1981), ruled that a bank did not violate the Act by demanding that its debtor in a precarious financial

condition employ a full-time business advisor designated by the bank. The court found that the arrangement was not a tie-in, and, further, that "in any event, the arrangement complained of falls within the range of appropriate traditional banking practices permissible under the Act." *Id.* at 832.

The Court of Appeals for the Seventh Circuit in *McCoy* v. *Franklin Savings Ass'n & Mortgage Management Co.*, 636 F.2d 172, 175 (1980), upheld a trial court's ruling that "the practice of conditioning mortgage loan commitments upon completion of improvements to the mortgaged property is 'a traditional banking practice founded on genuine business need' and therefore exempt from the prohibitions of Section 1972[.]" In *McCoy,* as here, the plaintiff alleged that the bank unilaterally varied the terms of the parties' loan agreement by requiring, in its second commitment letter, completion of major improvements not previously requested in its first commitment letter. The court further stated:

> Section 1972, however, is not concerned with modifications of the conditions of a loan agreement. It is concerned with the kind of conditions required, regardless of when they are imposed. The conditions imposed in both the first and second commitment letters are "related to and usually provided in connection with a loan" and therefore, as plaintiffs concede with respect to the first commitment letter, are not prohibited conditions under Section 1972. [636 F.2d at 175]

See also Tose v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879 (3d Cir.), *cert.* denied, 454 U.S. 893, 102 S.Ct. 390, 70 L.Ed. 2d 208 (1981) (not a violation of Section 1972

for a bank to condition loan to football team on requirement that owner relinquish his financial control to a responsible official designated by bank); *Clark* v. *United States,* 480 F.2d 235, 238 (10th Cir.), *cert.* denied, 414 U.S. 1004, —— S.Ct. ——, 38 L.Ed. 2d 240 (1973) (approving bank's requirement that loan applicant maintain certain amount on deposit to secure proposed loan).

The gist of these federal cases was aptly summarized in *Sterling Coal Co.* v. *United American Bank,* 470 F. Supp. 964 (E.D. Tenn. 1979). In *Sterling,* the court reviewed circumstances in which a bank had conditioned its extension of credit to a new closely-held corporation upon the imposition of substantial financial controls over the corporation and had required the corporation to guarantee the existing personal loans of its two sole stockholders. The court granted the bank summary judgment on the borrower's claim that the loan requirements violated § 1972, stating:

> The Act does not prohibit attempts by banks to protect their investments. These requirements, as demonstrated by this record, clearly were connected to the loans provided by the defendant. [470 F. Supp. at 965]

Accord Dannhausen v. *First Nat'l Bank,* 538 F. Supp. 551, 563 (E.D. Wisc. 1982); *Nesglo, Inc.* v. *Chase Manhattan Bank, N.A.,* 506 F. Supp. 254, 264 (D.P.R. 1980).

The federal courts also have specifically addressed defendant's argument that Continental's requirement of the Barclay mortgage was not exempt from the provisions of § 1972 since it was an "unusual" banking practice. The courts generally hold that the mere fact that a require-

ment imposed by a lender to protect its investment is an uncommon or unusual banking practice is not sufficient to constitute a violation of the Act. For example, the Court of Appeals for the Eleventh Circuit, in *Parsons Steel, Inc.* v. *First Alabama Bank,* 679 F.2d 242 (1982), held that a bank did not violate the Act by conditioning extensions of credit to a financially-ailing subsidiary corporation of its customer on a change in corporate management and majority stock ownership, even though those conditions may have been "unusual." The court observed:

> The plaintiffs were able to establish only that the requirement allegedly imposed upon them was an *unusual* banking practice. But to establish a violation of §1972, *the "unusual banking practice" must be shown to be a tying arrangement.* The plaintiffs must prove the existence of anti-competitive practices which require bank customers to accept . . . some other service or product . . . in order to obtain the bank product or service they desire. [1970] U.S. Code Cong. & Ad. News at 5535. [679 F.2d at 246 (emphasis added)]

Similarly, in *Freidco of Wilmington, Ltd.* v. *Farmers Bank,* 499 F. Supp. 995 (D. Del. 1980), the district court ruled, as in *Parsons,* that the mere fact that a condition required by a bank is unusual is not sufficient to constitute a violation of the Act. In *Freidco,* the alleged violation of the Act concerned conditions imposed on the repayment of a loan. The plaintiffs asserted that the arrangement was unusual. The district court ruled that uncommon requirements in a loan agreement did not constitute a *per se* violation of the Act, noting that

> it seems clear that Congress did not intend to "federalize" large segments of existing commercial and banking law, or to impose treble damage liability whenever a . . . court might conclude that the specific terms of a loan transaction were onerous or uncommon for some other reason. [499 F. Supp. at 1001]

As support for its position that the transaction constitutes a prohibited tie-in, Barclay relies upon *Swerdloff* v. *Miami National Bank,* 584 F.2d 54 (5th Cir. 1978), and *Costner* v. *Blount Nat'l Bank,* 578 F.2d 1192 (6th Cir. 1978). These two cases are clearly distinguishable from the one before us. In those cases, the prohibited transaction was anti-competitive and principally designed to enhance the bank's own market power.

In *Swerdloff,* a bank required the owners of an indebted corporation to sell 51% of its stock to a competitor which was also a customer of the bank. The Fifth Circuit held that where a bank conditioned further grants of credit on the requirement that the business be sold, "a benefit to the bank will be implied" for the purpose of a motion on the pleadings. 584 F.2d at 59. Thus, the court reinstated a complaint that had been dismissed on the pleadings by the district court. We find the court's reference to a "benefit to the bank" important. The proscribed benefit is one which results not from the legitimate protection of an investment, but from a "misuse of the economic power of a bank." *Id.*

This distinction between anti-competitive benefits and the ordinary benefits derived from the protection of a bank's security in a customer loan is equally relevant to *Costner.* In that case a bank required, as a condition

to the plaintiff's loan to finance a stock purchase in an automobile dealership, that a substantial share of the dealership's commercial installment paper be sold to the bank. 578 F.2d at 1194. Although this tying arrangement benefited the bank, it clearly did not protect the bank's investment. In fact, it was a major reason for the decline of the plaintiff's business. Thus, the violation of the Act in *Costner* resulted from the finding of a benefit entirely unrelated to the bank's security as a lender.

Accordingly, we adopt the sound reasoning in *Parsons* and *Freidco* and hold that even unusual or uncommon bank practices that are related to the bank's security as a lender do not violate the Act. Further, even if uncommon practices are not directly related to a bank's investment, they are violative of the Act only if they are anti-competitive. We thus examine the facts at bar in light of these principles.

We find that based on what Continental knew about the financial affairs of STE and Martin, its requirement of the mortgage constituted an appropriate banking practice to protect its investment. Continental knew that STE, previously a successful though heavily-indebted company, was in dire financial circumstances. The bank had serious doubts that STE could be saved even with an infusion of capital, a doubt that unfortunately proved true. Continental also undoubtedly knew that Martin's planned use of his C.D. to bail out STE placed his outstanding personal loan of $185,000 at substantial risk. Once Martin redeemed the C.D., his major liquid asset, he would have few remaining assets with which to repay his loan. There is no legal prohibition against a bank's protecting its investment by requesting additional collateral as security for a loan. Indeed, requiring a mortgage as additional

security for an outstanding loan is a traditional bank practice.[7]

This case is representative of bailout situations in which debtors in serious financial straits, working with their creditors, enter into numerous types of transactions that protect the creditors' investments while permitting the debtors' businesses to continue. The complexity of the transactions and special needs of the parties involved determine the type of arrangement that will be made to secure the joint aims of the debtor and the creditor. Due to the complicated circumstances of many bailout cases, the specific banking transactions utilized may appear uncommon, yet, in the milieu of bailouts, they constitute appropriate banking practices. As such, they do not violate the Act.

Further, we find that the practices engaged in by Continental here were not proven to be anti-competitive.[8] The asserted linkage between Continental's extension of credit to STE and the Barclay mortgage was not an attempt by the bank to corner the lending market. There is nothing that Continental desired more than for STE to ob-

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[7] See discussion of consideration, *infra,* at —— (slip. op. at 16-26).

[8] In its opinion holding that the Barclay mortgage violated the Act, the trial court made absolutely no finding of any anti-competitive effects generated by the transaction. This omission was no doubt the result of Barclay's failure to proffer any such evidence at trial. One of Barclay's five financial experts did briefly state that the overall transaction involving the STE loan and the Barclay mortgage was "reciprocal in nature." He offered no proof, however, that this alleged reciprocity produced adverse market consequences.

tain additional credit from some other financial institutions. Only after the Shulmans were unable to secure such outside funding did Continental request the Barclay mortgage. In short, the record establishes that the bank acted not as a market predator, but as a lender of last resort.

We conclude, therefore, that under the Act, Continental's requirement of the Barclay mortgage is not a prohibited transaction, and accordingly the mortgage is not void.

III.

Barclay further alleges that its mortgage is void because it was given without consideration. The trial court agreed that consideration was lacking, principally because Barclay's mortgage secured a pre-existing personal note that was not in default at the time of the March 30 agreement. We find that conclusion contrary to traditional applications of the doctrine of consideration.

As a preliminary matter, we note that Barclay has standing to allege lack of consideration as a defense to this foreclosure action. Barclay's corporate approval of the mortgage does not estop it from now objecting to the bank's alleged failure to provide consideration. We are aware of dictum seemingly contrary to this proposition in *Roxbury State Bank* v. *The Clarendon*, 129 N.J. Super. 358, 370 (App. Div.), certif. den., 66 N.J. 316 (1974), but find it inapposite. In noting in *Roxbury* that a corporation may be estopped from later challenging certain agreements it makes for the benefit of favored officers or shareholders, Judge Conford alluded generally to cases in which the corporation had sought to rescind the transactions because of its own failure to observe legal formali-

ties. *See, e.g., N.J. Car Spring and Rubber Co.* v. *Fields,* 85 N.J.L. 217 (E. & A. 1913); *Breslin* v. *Fries-Breslin Co.,* 70 N.J.L. 274 (E. & A. 1904). By contrast, the mortgage in this case was duly executed after a proper corporate resolution authorizing its issuance. Barclay's challenge goes to the substance of the transaction, not its form. The trial court was free to consider that challenge, notwithstanding Barclay's initial assent to the deal. *Cf. Levine* v. *Blumenthal,* 117 N.J.L. 23 (Sup. Ct. 1936), aff'd, 117 N.J.L. 426 (E. & A. 1937) (invalidating, for want of consideration, mutual agreement to reduce rent in spite of landlord's assent to the reduction). We accordingly review the disposition of that challenge here.

No contract is enforceable, of course, without the flow of consideration—both sides must "get something" out of the exchange. *Friedman* v. *Tappan Development Corp.,* 22 N.J. 523, 533 (1956); 1 A. Corbin, *Contracts* § 110 (1963 ed.). "Consideration is the price bargained for and paid for a promise." *Friedman,* 22 N.J. at 535. Valuable consideration may take the form of either a detriment incurred by the promisee or a benefit received by the promisor. *Novack* v. *Cities Serv. Oil Co.,* 149 N.J. Super. 542, 549 (Law Div. 1977), aff'd, 159 N.J. Super. 400 (App. Div.), certif. den., 78 N.J. 396 (1978); 1 *Corbin, supra,* §§ 121-122. In seeking to invalidate the mortgage on consideration grounds, Barclay has the burden of establishing that it failed to receive any bargained-for benefit from Continental and, further, that Continental did not incur any detriment at Barclay's request. *Wilson* v. *Stevens,* 105 N.J. Eq. 377, 383 (Ch. 1929). The mortgage is presumed to be supported by consideration "in the absence of clear and convincing evidence to the contrary." *Federal Beneficial Ass'n* v. *Eastern Land Co.,* 96 N.J. Eq. 628, 631 (E. & A. 1924).

Appendix A

Sometimes it is stated that a mortgage, as an executed conveyance, requires no consideration.[9] However, that proposition is only a half-truth, for the authorities almost universally recognize that there still must be consideration for the underlying debt that the mortgage secures.[10] The debt secured may be a pre-existing one. *Collerd* v. *Tully,* 78 N.J. Eq. 557, 559 (E. & A. 1911); *Poultrymen's Serv. Corp.* v. *Baer,* 63 N.J. Super. 163 (Law Div. 1960); *see also O'Neill Prod. Credit Ass'n* v. *Mitchell,* 209 Neb. 206, 307 N.W. 2d 115 (1981). *See generally Osborne, supra,* at 168; L. Jones, *A Treatise on the Law of Mortgages* § 611, at 489 (1879).

In addition, a third party can issue an enforceable mortgage to secure another's obligation. *Perkins* v. *Trinity Realty, supra,* 69 N.J. Eq. at 726; *Lee* v. *Kirkpatrick,* 14 N.J. Eq. 264 (Ch. 1862); *Federal Beneficial Ass'n, supra,* 96 N.J. Eq. at 630-31; *see also Seattle First Nat'l Bank* v. *Hart,* 19 Wash. App. 71, 573 P.2d 827 (1978). This proposition derives from the accepted principle that one may enter into a binding contract for the benefit of a third party. *Coast Nat'l Bank* v. *Bloom,* 113 N.J.L. 597, 602 (E. & A. 1934); *see also* 4 *Corbin, supra,* § 774. As long as a contract is bargained for by the promisee, it is immaterial that the benefit of the exchange runs

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[9] *E.g., Campbell* v. *Tompkins,* 32 N.J. Eq. 170 (Ch.), aff'd, 33 N.J. Eq. 362 (E. & A. 1880); *G. Osborne, Handbook on the Law of Mortgages* § 107, at 168 (2d ed. 1970); W. Walsh, *A Treatise on Mortgages* § 14, at 75 (1934); *see also* Clapp, "Consideration Is Not Necessary for a Mortgage," 58 N.J.L.J. 1 (May 2, 1935).

[10] *E.g., Perkins* v. *Trinity Realty Corp.,* 69 N.J. Eq. 723, 726 (Ch. 1905), aff'd, 71 N.J. Eq. 304 (E. & A. 1906); *Osborne, supra,* at 169; 59 *C.J.S., Mortgages* § 87 (1949).

to a designated third party beneficiary. *Guaclides* v. *Kruse*, 67 N.J. Super. 348, 354 (App. Div.), certif. den., 36 N.J. 32 (1961). Thus, third-party beneficiary principles applicable to contracts in general are equally applicable to mortgages. *See generally Osborne, supra,* at 168; *Walsh, supra,* at 75 n.4.

Having established that (1) a mortgage can be given to secure a pre-existing debt and (2) one can execute a mortgage for the benefit of a third party, we now consider the effect of combining these two propositions. Specifically, under what circumstances may one execute a mortgage to secure the antecedent debt of another? In general, a "stranger to the debt" cannot issue a mortgage thereupon without the passage of new and distinct consideration. *E.g., Jones, supra,* § 615 at 491; 59 C.J.S., *supra,* § 91 at 136-37. This principle is founded upon suspicions that a third-party mortgage exacted subsequent to the creation of the debtor's liability may be prone to fraud, since the debtor's benefit will not have been bargained for by the mortgagor. However, where the third person's mortgage is offered in exchange of an additional benefit to the debtor, the mortgage is enforceable. *Perkins* v. *Trinity Realty, supra,* 69 N.J. Eq. at 728; *Lee* v. *Kirkpatrick, supra,* 14 N.J. Eq. at 266; *see also Osborne, supra,* at 168 n.78; *Walsh, supra,* at 75 n.4. For instance, it has long been accepted that an individual may execute a mortgage to secure pre-existing liabilities of his or her spouse.[11]

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[11] *Eg., Cooke* v. *Louisville Trust Co.,* 380 S.W. 2d 255 (Ky. App. 1964); *Kansas Manufacturing Co.* v. *Gandy,* 11 Neb. 448, 9 N.W. 569 (1881); *Deal* v. *Christenbury,* 50 N.C. App. 600, 274 S.E. 2d 867 (1981); *American State Bank* v. *Cwach,* 85 S.D. 562, 187 N.W. 2d 107 (1971).

Appendix A

Only a minimal, often intangible, benefit need pass to satisfy the consideration requirement for third-party mortgages of existing debts. *E.g., Zions First Nat'l Bank* v. *United Health Clubs,* 533 F. Supp. 1127 (E.D. Pa. 1982) (upholding subsidiary's mortgage to secure parent corporation's past debts where creditor agreed to defer collection of quarterly interest payments). The two most common forms of such consideration are (1) the creditor's forbearance in suing on an overdue debt and (2) renewal or extension of the debtor's original note. When a mortgagee forbears from exercising his right to collect another's debt, he incurs a legal detriment amounting to consideration. *Perkins* v. *Trinity Realty,* 69 N.J. Eq. at 728-29. *Accord Kadish* v. *Kalloff,* 3 Ariz. App. 344, 414 P. 2d 193 (1966); *Riddle* v. *LaSalle Nat'l Bank,* 34 Ill. App. 2d 116, 180 N.E. 2d 719 (1962); *Safety Fed. Savings & Loan Ass'n* v. *Thurston,* 8 Kan. App. 2d 10, 648 P. 2d 267 (1982); *Kessler* v. *Liberty Ins. Bank,* 244 Ky. 73, 50 S.W. 2d 43 (Ky. App. 1932). Similarly, a lender's voluntary renewal or extension of time of an outstanding loan also constitutes valid consideration for a third-party mortgage. *Lortz* v. *Swartfager,* 34 Cal. Rptr. 436, 221 Cal. App. 2d 333 (1963) (extension of time); *State Bank* v. *Criswell,* 155 Kan. 314, 125 P. 2d 500 (1942) (renewal note); *see also Jones, supra,* § 611 at 489; 59 C.J.S., *supra,* § 92 at 137-38.

In reviewing the transaction here, we find at least two separate forms of consideration supporting the Barclay mortgage. First, we find that Continental explicitly or impliedly promised in March 1978 to forbear from calling Martin's note when it became due in June. Barclay contends that the record is devoid of such evidence, claiming that Continental's previous routine practice of renew-

ing the note on an unsecured basis made such a promise unlikely. This contention is unfounded. A prior promise to forbear from exercising a legal right may be inferred from evidence of subsequent forbearance, at least where such a promise appears reasonable under the circumstances. *Hockenbury ads. Myers*, 34 N.J.L. 346, 348 (Sup. Ct. 1870); *Szymanska* v. *Equitable Life Ins. Co.*, 183 A. 309 (Del. Super. Ct. 1936); *Merrimac Chem. Co.* v. *Moore*, 279 Mass. 147, 181 N.E. 219, 222 (1932); 1 *Corbin, supra*, § 137 at 589. With respect to prior debts, "the renewal of a note is in itself some evidence of forbearance." 1 *Corbin, supra*, § 213 at 214 (1982 Supp.). Here, Continental's renewal of Martin's note in June 1978 reasonably suggests a prior mutual understanding that Continental would not exercise its right to call his loan.[12] The language of Barclay's power to pledge for the June renewal note reflects such an understanding:

> In consideration of Bank [Continental] making or *continuing to make loans or otherwise becoming or continuing as a creditor* of MARTIN SHULMAN[,] Borrower) Undersigned [Barclay], unconditionally and absolutely agree[s] and consent[s] . . . [a]s security for any and all indebtedness and/or other liabilities of Borrower to Bank now or hereafter contracted . . . Bank shall have and is hereby given a lien, encumbrance and security interest in the following property[.] [Plaintiff's Trial Exhibit P4E (emphasis added)]

[12] Naturally, if Continental's assertion that it could have immediately called the note in March, 1978 were correct, there would be no need even to imply such a prior pormise of forbearance *post facto*.

The subsequent conduct of the parties and the language of the underlying instrument plainly indicate that all those interested in this transaction contemplated that if Martin procured the Barclay mortgage, Continental would renew his note when it became due. Indeed, Continental probably would have called the note had it not received such security, given the pending withdrawal of Martin's $350,000 certificate of deposit. Barclay has not presented any affirmative evidence to the contrary. Hence, we find Continental's implied promise of forebearance valid consideration for the mortgage.

Second, Barclay's assertion that consideration was absent here pales when the entire transaction between Continental, the Shulmans, and Barclay is considered as a whole. The trial court misconstrued the evidence in considering only Martin's personal loan as a potential source of consideration for Barclay's mortgage commitment. Viewing the transaction more broadly, we find it apparent that the Barclay mortgage was merely one of several conditions for Continental's continued and expanded financial support of the Shulmans' business ventures. The mortgage was simply part and parcel of the overall transaction. That transaction included, *inter alia*, an additional $1 million line of credit to the Shulmans, as well as the $350,000 two-week bridge loan advanced to Martin upon withdrawal of his certificate. Continental provided ample consideration for the whole transaction, of which the mortgage was simply one component.

We further address the argument that the mortgage was invalid because it was executed entirely for the benefit of Martin Shulman rather than Barclay, its corporate signatory. Briefly stated, the argument is that execution of the mortgage was beyond the proper exercise of Bar-

clay's corporate powers, or "*ultra vires.*" This argument is also without merit. Corporations in this state have the general power to mortgage their properties. N.J.S.A. 14A:3-1(e). It has long been accepted that a New Jersey corporation may issue a mortgage to secure debts other than those of the corporation itself, provided that it does not threaten the rights of other shareholders or creditors. *See Perkins* v. *Trinity Realty Co., supra,* 69 N.J. Eq. at 730-31 (validating mortgage extended by corporation to secure unrelated debts of one of its creditors). Barclay has not adduced any evidence establishing that its creditors were injured by the transaction here. And, since Martin was Barclay's sole shareholder, no other shareholders could have been harmed. *Osborn* v. *Montelac Pk.,* 35 N.Y.S. 610 (Sup. Ct. 1895), aff'd, 153 N.Y. 672, 48 N.E. 1106 (1897) (upholding third-party mortgage given by corporation to secure personal debt of its president, absent objection by creditors or other stockholders). Indeed, the mortgage was ratified by a proper corporate resolution. Accordingly, we reject Barclay's claim that the transaction was beyond the authorized scope of corporate undertakings.

IV.

Lastly, Barclay alleges that its mortgage is void because it was given under duress. Citing no authority, the trial court agreed, based upon its finding that Martin had no practical choice but to accede to Continental's demand for the mortgage. Although we do not dispute the trial court's factual findings, we disagree with its legal inference of duress from those facts.

During the last 50 years, the doctrine of economic duress has significantly developed and expanded, in recognition

of the ever-increasing complexity of the business world. Several courts, including the United States Supreme Court, have recognized that there are circumstances under which economic pressure may invalidate an otherwise enforceable contract. *See* 13 S. Williston, *Contracts,* § 1603 at 664 (3d ed. 1970); *United States* v. *Bethlehem Steel Corp.,* 315 U.S. 289, 62 S.Ct. 581, 86 L.Ed. 855 (1942); *Hartsville Oil Mill* v. *United States,* 271 U.S. 43, 70 L.Ed. 822, 46 S.Ct. 389 (1926). Although the doctrine has broadened, there is still not firm agreement as to the scope of the concept of "economic duress." Through the years several definitions have evolved.

As a starting point, we refer to the following definition of economic duress set forth in *Williston*:

> While there is disagreement among the courts as to what degree of coercion is necessary to a finding of economic duress, there is general agreement as to its basic elements:
>
> 1. The party alleging economic duress must show that he has been the victim of a wrongful or unlawful act or threat, and
>
> 2. Such act or threat must be one which deprives the victim of his unfettered will. [13 *Williston, supra,* § 1617 at 704 (footnotes omitted)]

In his explanation of these elements, *Williston* notes that "the party threatened must be compelled to make a disproportionate exchange of values or to give up something for nothing." *Id.*

The few reported cases in New Jersey that have defined economic duress are consistent with the *Williston* formulation. This Court in *Woodside Homes, Inc.* v. *Mor-*

ristown, 26 N.J. 529, 544 (1958), stated that economic duress requires "an assent by one party to an improper or wrongful demand by another under circumstances in which the former has little choice but to accede to the demand, *i.e.,* 'to do what he otherwise would not have done.'" In rejecting a claim of economic duress in *Woodside Homes,* we relied heavily upon the fact that the pressure exerted there was not inherently wrongful. *Id.* at 545.

Several years later in *Ross Sys.* v. *Linden Dari-Delite, Inc.,* 35 N.J. 329 (1961), we described the concept of economic duress in slightly different terms. In that case, we stated, "Payments are made under duress when they are induced by the wrongful pressure of the payee and the payor has no immediate and adequate remedy in the courts to resist them." *Id.* at 335. Notwithstanding the addition of the second element (no adequate remedy) in *Ross,* the New Jersey cases other than *Ross* defining economic duress have focused primarily on the first element (wrongful pressure) in determining whether economic duress has been established. *E.g., S.S. & O. Corp.* v. *Bernards Sewerage Auth.,* 62 N.J. 369, 387 (1973) (duress established by sewerage authority's use of coercive tactics to defeat potentially valid claim by developer; availability of developer's remedy not independently considered); *S.P. Dunham & Co.* v. *Kudra,* 44 N.J. Super. 565, 570-71 (App. Div. 1957) (questioning wisdom of "no remedy" requirement). We summarized the effect of this trend in *West Park Ave., Inc.* v. *Ocean Tp.,* 48 N.J. 122 (1966):

> Some authorities dispute the validity of the requirement that the victim of duress show he had no feasible remedy available to him. See *S.P. Dunham & Co.* v. *Kudra,* 44 N.J. Super. 565, 570-571 (App.

> Div. 1957). The point made is that if the payee's conduct is wrongful, nothing more should be demanded of the victim. We need not, however, say whether the criticism is correct. . . . *But it does seem safe to say that in evaluating the behavior of the parties, the nature and degree of wrongfulness of the payee may be the decisive factor.* [48 N.J. at 129 (emphasis added)]

We adhere today to our previous statement of the law of duress in *West Park Ave.*—that the "decisive factor" is the wrongfulness of the pressure exerted. The term "wrongful" in this context encompasses more than criminal or tortious acts, *Miller* v. *Eisele,* 111 N.J.L. 268, 276 (E. & A. 1933), for conduct may be legal but still oppressive. As the Appellate Division rightly observed in *Wolf* v. *Marlton Corp.,* 57 N.J. Super. 278, 287 (1959), "[w]e have come to deal, in terms of the business compulsion doctrine, with acts and threats that are wrongful, not necessarily in a legal, but in a moral or equitable sense."

Each case must be examined to determine if the threatening party acted wrongfully. "The situations are so varied that one cannot be sure of a simple formula." *West Park Ave.,* 48 N.J. at 129. We do, however, find the following generalizations cited in *Williston* relevant:

> One point has tended to become more certain: Where there is adequacy of consideration, there is generally no duress. . . . Whenever a party to a contract seeks the best possible terms, there can be no recission merely upon the grounds of "driving a hard bargain." Merely taking advantage of another's financial difficulty is not duress. Rather, the person alleging financial difficulty must allege that it was

> contributed to or caused by the one accused of coercion. . . . Under this rule, the party exerting pressure is scored only for that for which he alone is responsible. [*Williston, supra,* § 1617 at 708 (footnotes omitted)]

Applying these considerations to the facts here, we conclude that Continental did not act wrongfully in requesting the Barclay mortgage. First, as noted *supra* at —— (slip op. at 16-25), there was valid consideration for the mortgage transaction. Second, Continental itself was not the cause of STE's financial woes.

The New Jersey case most similar to the one at bar is *Ewert* v. *Lichtman,* 141 N.J. Eq. 34 (Ch. Div. 1947). In *Ewert,* restaurant operators sought purchasers for the business. Because the operators held only a month-to-month lease, they also sought assurance from the landlord that he would continue to lease the premises to the prospective buyer. The landlord agreed to grant the purchaser an extended lease on the condition that the present operators pay him $1,000. The present operators then alleged that the $1,000 payment was made under duress. Holding that the payment was not made under duress, the *Ewert* court cited a number of facts militating against the duress claim: the operators were not obligated to sell the business; the landlord was not obligated to lease the premises to the buyer; the landlord put no pressure on the operators to sell; the operators were represented by counsel; the landlord was understandably skeptical of the buyer's business acumen; and, most significantly, the difficulties encountered by the operators were self-created rather than imposed by the landlord. *Id.* at 39. Taken as a whole, these factors plainly indicated that the landlord's request for the addi-

tional $1,000 was not wrongful. Hence, the operators' duress claim failed.

Like the Landlord in *Ewert,* Continental was not obligated to do further business with the party claiming duress. Specficially, the bank did not have to lend STE any additional capital or to renew Martin's loan. In fact, Continental encouraged STE to seek funds from other sources. Like the operators in *Ewert,* STE's own financial predicament made such other alternatives scarce, perhaps nonexistent. Nor were the financial difficulties of STE and the Shulmans the result of any act of Continental.

Continental acted properly in requesting the mortgage as security for Martin's indebtedness to the bank. Continental reasonably feared that because of STE's financial condition and Martin's attempt to bail out STE, Martin would be unable to pay his personal loan of $185,000. In requesting the Barclay mortgage, Continental did not seek to exploit the Shulman's already-serious financial condition. Rather, it merely attempted to protect its existing substantial investment in the financial activities of the Shulmans and STE.

Both the Shulmans and Continental anticipated a benefit from the arrangement. Shulman was able to obtain the necessary funds for the Junior Participation Agreement and thereby assure that STE would receive additional capital from the bank. Continental obtained additional protection for its substantial loans to STE and Martin. The subsequent financial demise of STE and Martin should not transform these voluntarily-agreed upon conditions into evidence of duress. As the *Ewert* court properly noted, "[t]he qualities of the bargain which the litigant once regarded as expedient and pragmatical ought not to be reprocessed by the court into actionable duress." 141 N.J. Eq. at 38. The maxim applies equally to this case.

In conclusion, the financial difficulties suffered by Martin Shulman and STE upon entering these arrangements do not diminish the fact that Shulman expected to benefit from the deal. Furthermore, because these financial troubles were not caused by Continental, they cannot be used as support for the duress defense. STE's inability to obtain outside capital, rather than pressure from Continental, forced STE and Shulman to accept Continental's terms. Continental's request for the mortgage simply was not wrongful.[13] We therefore reverse the lower court's unsupported finding of duress as clearly contrary to the weight of the evidence here.

V.

To summarize, we find that, in requiring the Barclay mortgage, Continental was engaged in a sound banking transaction to protect its substantial loans to STE and Martin. We conclude the Barclay mortgage was not violative of the anti-tying provisions of the Bank Holding Act, was supported by valid consideration, and was the product of arms-length bargaining rather than of economic duresss. Accordingly, the judgment of the Appellate Division in favor of defendant is hereby reversed.

Chief Justice Wilentz and Justices Clifford, Schreiber, Handler, Pollock and O'Hern join in this opinion.

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[13] In light of our holding that Continental's conduct was not wrongful, we need not reach the delicate issue of whether Barclay's response to that conduct should be analyzed from an "objective" or a "subjective" standard. *Compare Rubenstein* v. *Rubenstein,* 20 N.J. 359, 367 (1956) (subjective standard) *with King* v. *Margolis,* 133 N.J. Eq. 61 (Ch.), aff'd, 133 N.J. Eq. 617 (E. & A. 1943) (objective standard). We leave that doctrinal debate to another day.

APPENDIX B

Per Curiam Judgment of the Superior Court of New Jersey, Appellate Division

(Filed—April 6, 1982)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-4140-80T2

CONTINENTAL BANK OF PENNSYLVANIA,

Plaintiff-Appellant,

v.

BARCLAY RIDING ACADEMY, INC., now known as BARCLAY EQUESTRIAN CENTER, INC., a New Jersey corporation,

Defendant-Respondent.

Argued on March 30, 1982—Decided April 6, 1982.

Before Judges Fritz, Ard and Trautwein.

On appeal from the Superior Court of New Jersey, Chancery Division, Burlington County.

George F. Kugler, Jr., argued the cause for appellant (Archer, Greiner & Read, attorneys; Morton Newman, William E. Taylor, III, Stephen M. Orlofsky, Blank,

Rome, Comisky & McCauley, of counsel; Mr. Kugler on the brief).

W. Barry Rank argued the cause for respondent (Weston, Kravitz & Rank, attorneys; Mr. Rank on the brief).

PER CURIAM

The judgment of the trial court dated May 21, 1981 is affirmed substantially for the reasons expressed in Judge Wood's oral opinion of April 6, 1981.

Affirmed.

APPENDIX C

Opinion and Judgment of the Superior Court of New Jersey, Chancery Division (April 6, 1981)

SUPERIOR COURT OF NEW JERSEY
Chancery Division—Burlington County

Docket No. F-1134-79

CONTINENTAL BANK OF PENNSYLVANIA,

Plaintiff,

vs.

BARCLAY RIDING ACADEMY, INC., now known as BARCLAY EQUESTRIAN CENTER, INC., a New Jersey Corporation,

Defendant.

Burlington County Courthouse
Mount Holly, New Jersey
April 6, 1981

Before:

Alexander C. Wood III, JSC.

Transcript Ordered by:

Ira R. Deiches, Esq.

Appearances:

Fluharty, Freeman, Gerstein & Mintz
By: Stephen M. Orlofsky, Esq.
and Ira R. Deiches, Esq.
For the Plaintiff

Weston, Kravitz & Rank
By: Barry Rank, Esq.
For the Defendant

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(2)* The Court: Gentlemen, you've given the Court a great deal to think about, but I think that the issues in this case, the issue in this case is really a narrower one than has been intimated in argument and in the course of summations.

This action here, and I understand that there are other actions pending in other courts between these same parties, but this is an action by Continental Bank of Pennsylvania against Barclay Riding Academy, now known as Barclay Equestrian Enterprises, I believe for the foreclosure of mortgage. The facts underlying the delivery of the execution and delivery of the mortgage are, I think, relatively clear and relatively undisputed.

It's clear that the relationship between the bank and the brothers Shulman, Martin and Harry Shulman, the relationship is one of long standing. Shulmans had a quite large and for a time very successful industrial and commercial empire.

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* Figures in parentheses refer to each new page of the stenographic transcript.

Appendix C

The company with which we have been dealing and with whose affairs we've been dealing a good deal during the course of this trial was (3) known as Shulman Transport Enterprises. In the course of their dealings, Martin Shulman borrowed the sum of $185,000 from the bank. The loan was unsecured, and it remained unsecured and unpaid, albeit the interest was paid currently and the loan was not in default right up to about the time of the occurrences here involving Shulman Transport Enterprises.

The reason for the demanding and the execution and delivery of the mortgage revolve around the difficulties in which Shulman Transport Enterprises found itself. It is undisputed that about 1977 Shulman Transport Enterprises, of which Martin and Harry Shulman were principal stockholders; Martin Shulman, I believe was the president of the company; although Shulman Transport Enterprises had been very big in the commercial and transportation field, it was in considerable difficulty. In fact, the dificuties were so great that it was apparent that new infusions of capital were going to have to be obtained or the company would find itself going bankrupt.

Indeed, the situation was that bankruptcy was actually contemplated, and it was averted (4) by the request to and the extension of a very large additional infusion of a line of credit by the bank into Shulman Transport Enterprises. I believe that the additional credit was an amount of somewhere around between six and a half and and seven and a half million dollars, and security for that additional advance of capital was the recent and consequently valid accounts receivable of Shulman Transport Enterprises. The collateral consisted of the accounts receivable not over ninety days old and to the extent of 75 percent of those accounts receivable.

Appendix C

The infusion of capital did not have the desired effect, and it became apparent in late 1977, 1978 that the company's situation was very serious or their auditors couldn't certify them as in a position to continue in business.

Meetings were held at Continental Bank and further infusions of capital were sought, and the bank advised that substantial additional capital from outside would have to be sought.

To that end American Airlines was solicited and actually was—apparently indicated that it was in a position to and would make advances, (5) make a substantial advance of capital, but only against certain collateral, against substantial collateral. And for all the reasons which were indicated and which needn't be summarized here, the collateral demanded by American Airlines was, apparently, not forthcoming. And furthermore, American Airlines then determined that, due to its own commercial relationship with STE and also its own obligations and duties under the regulations of the Civil Aeronautics Board, it simply was not in a position to advance capital to this ailing enterprise. So the possibility of a loan or an advancement of capital from American Airlines weren't coming.

It was in this context and in this circumstance that the meeting of March 30, 1978, took place, the conference one might say, in which the Shulmans were seeking for some way to avert complete catastrophe. And it would appear that the bank, because of its own substantial involvement in STE, was also seeking for its own reasons and its own interests to avert a catastrophe of STE.

What came out of that meeting was the proposal that the Shulmans, Martin and Harry (6) Shulman, advance $1.3 million of their own money to—whether was to STE or to the bank directly I am not quite clear, but it is clear

that the requirement—that there was a requirement that this money be advance, and Martin and Harry Shulman convinced themselves as ready, willing, and able to make this permanent advance of capital to the company.

The testimony of the bank's officers was that, as some protection to the Shulman's, they would be offered these junior participation agreement in the, quote, loan, unquote, which was being made to STE. This was proposed when the bank convinced itself as not being willing to forgo or to give the Shulmans any further security or collateral or consent that they should get any further security or collateral for their own advance, because the bank was unwilling and unable to surrender or forgo any of the collateral which it had. So that the proposal was that the Shulmans advance $1.3 million in return for which the bank would infuse another—an additional million dollars of capital into the company was actually on a, as has been said and I agree with the position (7) of the defendants in this, on a take-it-or-leave-it basis.

It would appear that the and I find as a fact that the Shulmans were told that their proposition would not be accepted unless they—and no additional capital would be advanced to STE unless they themselves advanced the $1.3 million and this in return only for a so-called junior participation agreements which obviously left them with really more apparent than real in terms of security, because the bank obviously stood in a prior position, and the junior participation agreements were worthless as security in the face of the bank's restrained priority.

I'm satisfied that this was the demand that was made and that the Shulmans were given to understand that they had no choice but to accept this proposal in the absence of which the company would obviously go under and the Shul-

mans probably with it. Granted that the bank had a considerable interest in seeing the company stay afloat. Nevertheless, it was the Shulmans who had everything, who had their entire financial career, their entire—all (8) they had in the world, you might say, on the line so far as this situation of this ailing enterprise was concerned.

Whether and when the decision to—of the bank to also demand of the Shulman, of Mr. Harry Shulman, that he at this point secure the personal loan to him—

Mr. Rank: Your Honor, I don't mean to object, but you said Harry Shulman.

The Court: I meant Martin Shulman.

Mr. Rank: I just want the record to—

The Court: Thank you. That was a lapsis linguae. That he secure the personal loan to him of $185,000 by a mortgage on a property owned by a corporation of which he was the sole owner and sole stockholder. Whether it was made at that meeting or before it seems to me is immaterial. The fact is that, in connection with this entire transaction, and this appears to be undisputed, Mr. Peraino took him aside and told him that the execution of a mortgage to secure this $185,000 would be demanded. In fact, as I recall the testimony, the words *sine qua non* were used. It was, as much as where the junior participation agreement arrangement, it (9) was a condition of the bank stepping in and saving the company, and saving STE at this point.

Now, this loan was a personal loan to Martin Shulman. Barclay Equestrian Enterprises was a separate corporation having no relationship that has been brought out in any of the evidence or testimony to STE. It was separate

and apart, but all of a sudden, as a condition of the bank advancing additional capital to STE, it was demanded that Martin Shulman cause Barclay Equestrian Enterprises to execute a mortgage of its property to secure this $185,000 personal loan.

Now, this, of course, is because the personal finances of Martin Shulman himself were obviously very seriously in jeopardy, and the bank felt, and perhaps with justification, that it must have this security while it could get it.

Reference has been made to a certificate of deposit of $350,000 which had been on deposit for a long time with the bank. It also did not secure Mr. Martin Shulman's personal loan, but was simply a certificate of deposit owned by (10) him and was in the bank. That is, the deposit was in the bank, but the certificate was his, and it was not security for this personal loan. But when it became apparent that this $350,000 was going to have to go as part of financing arrangement to shore up STE in its straightened condition, then the decision obviously was made to at that point, as further condition of this entire transaction, to demand and secure the mortgage.

The mortgage was without any other consideration whatever. The loan which it was intended to secure had been in effect for years and was not in default, and it must really be concluded that the mortgage was delivered without any consideration at this point.

But the principal fact remains that it was a loan—that it was a mortgage executed and delivered under really circumstances which one must call circumstances of duress.

It is, as has been pointed out I think with great justification, it's all very well to say that the request may have taken the form of a request and may have in terms on its

face left some room for assent or refusal, but the (11) fact remains that, without compliance with all of the bank's demands with respect both to the junior participation agreements and the mortgage, the bank would not have gone through with this transaction, and that was the impression and the clear message that was given to the Shulmans which rendered them willing to go ahead and accede to the demands of the bank, risk another $1.3 million of their own money, which they did, and find them—and also led Mr. Martin Shulman to execute the mortgage, which is really the thing before us today.

Title 12, U.S.C.A., Section 1972, provides among other things that a bank shall not in any manner extend credit, lease, or sell property of any kind or furnish any service or fix or vary the consideration of any of the foregoing on the condition or requirement among others that the customer provide some additional credit, property, or service to such bank other than those related to and usually provided in connection with a loan, discount, deposit, or trust service.

There's been testimony by experts of formidable qualifications that the condition (12) and the demands of the bank here or the requirements of the bank here were definitely other than those related to and usually provided in connection with a loan, discount, deposit, or trust service.

Question, whether this Court must apply that prohibition, that injunction, shall we say, to this case. I think that the case of *Associated East Mortgage Company* v. *Young*, a case in the Chancery Division of this court decided by Judge Kentz in 1978, is pertinent and the principles there enunciated are applicable. And in that case the Court held that certain violations by a mortgage lender of HUD, of

Housing and Urban Development, Department of Housing and Urban Development regulations which are promulgated for the protection both of borrowers and of lenders mandated that the Court step in in that case and hold that there must be—that relief must be given to the mortgage or from the foreclosure of a mortage by the HUD mortgage lender.

Judge Kentz said, among other things, "Equitable principles of fair play also support the desire of a court of equity to give relief (13) to a mortgagor under the circumstances presented here. These principles govern the remedy of foreclosure." Without citing the cases which Judge Kentz cited, "The doctrine of unclean hands is also recognized in foreclosure actions." "The unclean hands doctrine refuses relief to a plaintiff whose conduct has violated the court's conscience, good will or other equitable principles."

And based on those general principles as well as on the violation of the HUD regulations, Judge Kentz held and I think his opinion is still the law, that the mortgage in that case was void and, although the debt still was outstanding, that the mortgage could not be foreclosed.

For similar reasons, I think that this mortgage was and I must conclude that this mortgage was executed and delivered in response to demands which were illegal and which the bank had no right to make under the—and was positively proscribed from making by the section of the banking act which has been cited and which is the crux of this entire case, Section 1972 of Title 12, U.S.C.A., and for that reason, (14) the Court must hold that this mortgage in question is void and cannot be honored and cannot be foreclosed and that the Complaint in foreclosure must be dismissed.

I don't think at this point there is anything further to add, although it might be said that I view this case as—I view the mortgage as part of the overall transaction. But quite aside from the overall transaction and certainly in the light of all of the circumstances here, it can only be concluded that the execution and delivery of the mortgage itself were demanded and received in violation of the terms of the statute that I have quoted. And so as I said before, for all the reasons stated, the Complaint must be dismissed.

I think that disposes of the case because the Counterclaim I believe had been totally withdrawn. Is that correct?

Mr. Rank: That's true, Your Honor.

The Court: Any further questions, gentlemen?

Mr. Rank: So the record is clear, Your Honor has stated that he views the mortgage as part of the overall transaction. Am I to (15) understand that Your Honor's not passing on whether the overall transaction, the junior participation and the injection of the $1.3 million was itself a violation of Section 106?

The Court: I don't specifically pass on that because I don't think it's necessary.

Mr. Rank: All right.

The Court: As I said relatively early in our arguments this morning, the mortgage here is what we're dealing with. This is an action to foreclose a mortgage. It's an action not against the Shulmans but against Barclay Equestrian Enterprises, and the decision of the Court is rendered because the Court concludes on all the evi-

dence that it itself, the mortgage itself was part of a transaction proscribed by the banking act.

Mr. Rank: Fine. Thank you, Your Honor.

Mr. Orlofsky: Thank you, Your Honor. And may I thank you for the courtesy which you—

The Court: It's been a pleasure to have you with us, Mr. Orlofsky. I hope we'll have the pleasure of seeing more of you. My thanks also to Mr. Deiches for his presence and his assistance and cooperation with the Court (16) throughout these proceedings.

Mr. Orlofsky: Thank you, Your Honor.

The Court: Mr. Rank, you'll prepare an order?

Mr. Rank: Yes, Your Honor.

The Court: The exhibits, gentlemen, do you desire the Court to retain them for the time being?

Mr. Rank: I have no need for the Court to have them. It's up to—

Mr. Orlofsky: Why don't we do that, Your Honor. We can always pick them up.

The Court: I think that perhaps under the circumstances the Court had better retain the exhibits until it receives further instructions from counsel.

Mr. Orlofsky: Thank you, Your Honor.

(Decision concluded.)

APPENDIX D

Answer

(Filed—February 21, 1980)

SUPERIOR COURT OF NEW JERSEY
Chancery Division—Burlington County

Docket No. F-1134-79

Civil Action

CONTINENTAL BANK OF PENNSYLVANIA,

Plaintiff,

vs.

BARCLAY RIDING ACADEMY, INC., now known as BARCLAY EQUESTRIAN CENTER, INC., a New Jersey Corporation,

Defendant.

Defendant, Barclay Riding Academy, Inc., n/k/a Barclay Equestrian Center, Inc., a New Jersey Corporation, whose address is 5 East Riding Drive, Evesham Township, Burlington, New Jersey, in answer to plaintiff's Complaint says:

Appendix D

First Count

1. The allegations of Paragraph 1 are denied.

2. The defendant admits the execution of a mortgage, but denies the validity of same.

3. No answer is required to the allegations of Paragraph 3 since the validity of the mortgage is contested.

4. Defendant neither admits nor denies the allegations of Paragraph 4 but leaves plaintiff to its proofs.

5. Defendant neither admits nor denies the allegations of Paragraph 5 but leaves plaintiff to its proofs.

6. The allegations of Paragraph 6 are denied.

Second Count

1. Defendant repeats its anwers to the allegations of the First Count of the Complaint and makes them a part hereof as if repeated at length.

2. The allegations of Paragraph 2 are admitted.

3. The allegations of Paragraph 3 are denied.

4. The allegations of Paragraph 4 are denied.

5. The allegations of Paragraph 5 are denied.

First Separate Defense

The Bond and mortgage referred to in plaintiff's Complaint is invalid pursuant to the doctrine of failure of consideration.

Appendix D

SECOND SEPARATE DEFENSE

The plaintiff is estopped from claiming any and all sums from the defendant.

THIRD SEPARATE DEFENSE

The plaintiff is guilty of fraud and misrepresentation in that the bond and mortgage was demanded of the defendant as a condition for the promise by the plaintiff to extend funds to Schulman Transport Enterprises, when the plaintiff had no intention of granting the additional funds to Schulman Transport Enterprises.

FOURTH SEPARATE DEFENSE

The plaintiff's claim is barred by the doctrine of Failure of Consideration.

FIFTH SEPARATE DEFENSE

The bond and mortgage which form the subject matter of this litigation are void as violative of Section 1972 of The Bank Holding Company Act, Title 12 U.S.C. § 1971, et seq.

SIXTH SEPARATE DEFENSE

The bond and mortgage which form the losses of this proceeding were the result of duress and are void.

Appendix D

DEMAND FOR JURY TRIAL

The defendant demands a trial by jury as to all issues.

WESTON, KRAVITZ & RANK
A Professional Corporation
Attorneys for Defendant
By W. BARRY RANK

Dated: February 25, 1980

APPENDIX E

Order of the Supreme Court of the United States to Extend Filing

SUPREME COURT OF THE UNITED STATES

No. A-51

BARCLAY RIDING ACADEMY, INC.,

Petitioner,

v.

CONTINENTAL BANK OF PENNSYLVANIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is Ordered that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 27, 1983.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 27th day of July, 1983

APPENDIX F

Relevant Statutes

§ 1971. Definitions

As used in this chapter, the terms "bank", "bank holding company", "subsidiary", and "Board" have the meaning ascribed to such terms in section 1841 of this title. For purposes of this chapter only, the term "company", as used in section 1841 of this title, means any person, estate, trust, partnership, corporation, association, or similar organization, but does not include any corporation the majority of the shares of which are owned by the United States or by any State. The term "trust service" means any service customarily performed by a bank trust department.

Pub.L. 91-607, Title I, § 106(a). Dec. 31, 1970, 84 Stat. 1766.

§ 1972. Certain tying arrangements prohibited; correspondent accounts

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

(A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

(B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this chapter.

(2)(A) No bank which maintains a correspondent account in the name of another bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank unless such extension of credit is made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(B) No bank shall open a correspondent account at another bank while such bank has outstanding an extension of credit to an executive officer or director of, or other person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, the bank desiring to open the account, unless such extension of credit was made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(C) No bank which maintains a correspondent account at another bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank, unless such extension of credit is

(B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

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(C) No bank which maintains a correspondent account at another bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank, unless such extension of credit is

made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(D) No bank which has outstanding an extension of credit to an executive officer or director of, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, another bank shall open a correspondent account at such other bank, unless such extension of credit was made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(E) For purposes of this paragraph, the term "extension of credit" shall have the same meaning given it in section 371c of this title and the term "executive officer" shall have the same meaning given it under section 375a of this title.

(F)(i) Any bank which violates or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such bank who violates any provision of this paragraph shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues. The penalty shall be assessed and collected by the Comptroller of the Currency in the case of a national bank, the Board in the case of a State member bank, or the Federal Deposit Insurance Corporation in the

case of an insured nonmember State bank, by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counselling, or aiding or abetting a violation.

(ii) In determining the amount of the penalty the Comptroller of the Currency, the Board or the Federal Deposit Insurance Corporation, as the case may be, shall take into account the appropriateness of the penalty with respect to the size of the financial resources and good faith of the bank or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

(iii) The bank or person assessed shall be afforded an opportunity for agency hearing, upon request made within ten days after issuance of the notice of assessment. In such hearing, all issues shall be determined on the record pursuant to section 554 of Title 5. The agency determination shall be made by final order which may be reviewed only as provided in subdivision (iv). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

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(iv) Any bank or person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States court of appeals for the circuit in which the home office of the bank is located, or the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within ten days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the Comptroller of the Currency, the Board or the Federal Deposit Insurance Corporation, as the case may be. The Comptroller of the Currency, the Board or the Federal Deposit Insurance Corporation, as the case may be, shall promptly certify and file in such court the record upon which the penalty was imposed, as provided in section 2112 of Title 28. The findings of the Comptroller of the Currency, the Board or the Federal Deposit Insurance Corporation, as the case may be, shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(E) of Title 5.

(v) If any bank or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the agency, the Comptroller of the Currency, the Board or the Federal Deposit Insurance Corporation, as the case may be, shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(vi) The Comptroller of the Currency, the Board and the Federal Deposit Insurance Corporation shall promulgate regulations establishing procedures necessary to implement this section.

(vii) All penalties collected under authority of this section shall be covered into the Treasury of the United States.

(G)(i) Each executive officer and each stockholder of record who directly or indirectly owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of an insured bank shall make a written report to the board of directors of such bank for any year during which such executive officer or shareholder has outstanding an extension of credit from a bank which maintains a corresponding account in the name of such bank. Such report shall include the following information:

(1) the maximum amount of indebtedness to the bank maintaining the correspondent account during such year of (a) such executive officer or stockholder of record, (b) each company controlled by such executive officer or stockholder, or (c) each political or campaign committee the funds or services of which will benefit such executive officer or stockholder, or which is controlled by such executive officer or stockholder;

(2) the amount of indebtedness to the bank maintaining the correspondent account outstanding as of a date not more than ten days prior to the date of filing of such report of (a) such executive officer or stockholder of record, (b) each company controlled by such executive officer or stockholder, or (c) each political or campaign committee the funds or services of which will benefit such executive officer or stockholder;

(3) the range of interest rates charged on such indebtedness of such executive officer or stockholder of record; and

(4) the terms and conditions of such indebtedness of such executive officer or stockholder of record.

(ii) Each insured bank shall compile the reports filed pursuant to subparagraph (G)(i) and forward such compilation to the Comptroller of the Currency in the case of a national bank, the Board in the case of a State member bank, and the Federal Deposit Insurance Corporation in the case of an insured nonmember State bank.

(iii) Each insured bank shall include in the report required to be made under subsection (k)(1) of section 1817 of this title a list by name of each executive officer or stockholder of record who directly or indirectly owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of the bank who files information required by subparagraph (G)(i) and the aggregate amount of all extensions of credit by correspondent banks to such executive officers or stockholders of record, any company controlled by such executive officers or stockholders, and any political or campaign committee the funds or services of which will benefit such executive officers or stockholders, or which is controlled by such executive officers or stockholders.

Pub.L. 91-607, Title I, § 106(b), Dec. 31, 1970, 84 Stat. 1766; Pub.L. 95-630, Title VIII, § 801, Nov. 10, 1978, 92 Stat. 3690.

CHAPTER 22—TYING ARRANGEMENTS

§ 1972. Certain tying arrangements prohibited; correspondent accounts

[See main volume for text of (1)]

(2)(A) No bank which maintains a correspondent account in the name of another bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank or to any related interest of such person unless such extension of credit is made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(B) No bank shall open a correspondent account at another bank while such bank has outstanding an extension of credit to an executive officer or director of, or other person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the

Appendix F

power to vote more than 10 per centum of any class of voting securities of, the bank desiring to open the account or to any related interest of such person, unless such extension of credit was made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(C) No bank which maintains a correspondent account at another bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank or to any related interest of such person, unless such extension of credit is made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(D) No bank which has outstanding an extension of credit to an executive officer or director of, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, another bank or to any related interest of such person, shall open a correspondent account at such other bank, unless such extension of credit was made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(E) For purposes of this paragraph, the term "extension of credit" shall have the meaning prescribed by the Board pursuant to section 375b of this title and the term "executive officer" shall have the same meaning given it under section 375a of this title.

(F)(i) Any bank which violates or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such bank who violates any provision of this paragraph shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: *Provided*, That the agency having authority to impose a civil money penalty may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under such authority. The penalty may be assessed and collected by the Comptroller of the Currency in the case of a national bank, the Board in the case of a State member bank, or the Federal Deposit Insurance Corporation in the case of an insured nonmember State bank, by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counselling, or aiding or abetting a violation.

[See main volume for text of (ii) and (iii)]

(iv) Any bank or person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States court of appeals for the circuit in which the home office of the bank is located, or the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within twenty days from the service of such order, and simultaneously sending a copy of such notice by registered or certified mail to the Comptroller of the Currency, the Board or the Federal Deposit Insurance Corporation, as the case may be. The Comptroller of the Currency, the Board or the Federal Deposit Insurance Corporation, as the case may be, shall promptly certify and file in such court the record upon which the penalty was imposed, as provided in section 2112 of Title 28. The findings of the Comptroller of the Currency, the Board or the Federal Deposit Insurance Corporation, as the case may be, shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(E) of Title 5.

[See main volume for text of (v) to (vii), (G)(i)]

(ii) The appropriate Federal banking agencies are authorized to issue rules and regulations, including definitions of terms, to require the reporting and public disclosure of information by any bank or executive officer or principal shareholder thereof concerning any extension of credit by a correspondent bank to the reporting bank's executive officers or principal shareholders, or the related interests of such persons.

(iii) Repealed. Pub.L. 97–320, § 428(b)(2), Oct. 15, 1982, 96 Stat. 1526.

(H) For the purpose of this paragraph—

(i) the term "bank" includes a mutual savings bank;

(ii) the term "related interests of such persons" includes any company controlled by such executive officer, director, or person, or any political or campaign committee the funds or services of which will benefit such executive officer, director, or person or which is controlled by such executive officer, director, or person; and

(iii) the terms "control of a company" and "company" have the same meaning as under section 375b of this title.